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## **FEDERAL MARITIME COMMISSION**

### **46 CFR Parts 530 and 531**

#### **Docket No. 16-05**

#### **RIN 3072-AC53**

### **Amendments to Regulations Governing Service Contracts and NVOCC Service Arrangements**

**AGENCY:** Federal Maritime Commission.

**ACTION:** Notice of Proposed Rulemaking.

**SUMMARY:** The Federal Maritime Commission (FMC or Commission) proposes to amend its rules governing Service Contracts and NVOCC Service Arrangements. The proposed rule is intended to update, modernize, and reduce the regulatory burden.

**DATES:** Submit comments on or before September 23, 2016. In compliance with the Paperwork Reduction Act, the Commission is also seeking comment

on revisions to an information collection. See the Paperwork Reduction Act section under Regulatory Analyses and Notices below. Please submit all comments relating to the revised information collection to the Commission and to the Office of Management and Budget (OMB) at the address listed in the ADDRESSES section on or before October 24, 2016. Comments to OMB are most useful if submitted within 30 days of publication.

**ADDRESSES:** You may submit comments by the following methods:

- *E-mail:* secretary@fmc.gov. Include in the subject line: “Docket 16-05, [Commentor/Company name].” Comments should be attached to the e-mail as a Microsoft Word or text-searchable PDF document. Only non-confidential and public versions of confidential comments should be submitted by e-mail.
- *Mail:* Karen V. Gregory, Secretary, Federal Maritime Commission, 800 North Capitol Street, N.W., Washington, DC 20573-0001.

*Docket:* For access to the docket to read background documents or comments received, go to the Commission’s Electronic Reading Room at: <http://www.fmc.gov/16-05>.

*Confidential Information:* The Commission will provide confidential treatment for identified confidential information to the extent allowed by law. If your comments contain confidential information, you must submit the following:

- A transmittal letter requesting confidential treatment that identifies the specific information in the comments for which protection is sought and demonstrates that the information is a trade secret or other confidential research, development, or commercial information.
- A confidential copy of your comments, consisting of the complete filing with a cover page marked “Confidential-Restricted,” and the confidential material clearly marked on each page. You should submit the confidential copy to the Commission by mail.
- A public version of your comments with the confidential information excluded. The public version must state “Public Version – confidential materials excluded” on the cover page and on each affected page, and must clearly indicate any information withheld. You may submit the public version to the Commission by e-mail or mail.

**FOR FURTHER INFORMATION CONTACT:** For questions regarding submitting comments or the treatment of confidential information, contact Karen V. Gregory, Secretary. *Phone:* (202) 523-5725. *E-mail:* secretary@fmc.gov. For technical questions, contact Florence A. Carr, Director, Bureau of Trade Analysis. *Phone:* (202) 523-5796. *E-mail:* tradeanalysis@fmc.gov. For legal questions, contact Tyler J. Wood, General Counsel. *Phone:* (202) 523-5740. *E-mail:* generalcounsel@fmc.gov.

## **SUPPLEMENTARY INFORMATION:**

### **I. Background**

In 1984, Congress passed the Shipping Act of 1984 (the Shipping Act or the Act). 46 U.S.C. 40101 *et seq.*, which introduced the concept of carriage under service contracts with the

Federal Maritime Commission (Commission or FMC). The pricing of liner services via negotiated contracts, rather than exclusively by public tariffs, was a change that had profound effects on the liner industry. FMC regulations require all ocean freight rates, surcharges, and accessorial charges in liner trades to be published in ocean common carrier tariffs or agreed to in service contracts filed with the Commission. Contemporaneous with the filing of service contracts, carriers are also required to make available to the public a concise statement of essential terms in tariff format.

In 1998, Congress passed the Ocean Shipping Reform Act (OSRA), amending the Shipping Act of 1984 relating to service contracts. To facilitate compliance and minimize the filing burdens on the oceanborne commerce of the United States, service contracts and amendments effective after April 30, 1999, are required by FMC regulations to be filed with the Commission in electronic format. This eliminated the regulatory burden of filing in paper format, thereby saving ocean carriers both time and money. In addition, OSRA reduced the essential terms that had to be made publicly available.<sup>1</sup> Service contracts and amendments continue to be filed into the Commission's electronic filing system, SERVCON.

In 2005, the Commission issued a rule exempting non-vessel-operating common carriers (NVOCCs) from certain tariff publication requirements of the Shipping Act, pursuant to section 16 of the Shipping Act, 46 U.S.C. 40103. 69 FR 75850 (Dec. 20, 2004) (final rule). Under the exemption, NVOCCs are relieved from certain Shipping Act tariff requirements, provided that the carriage in question is performed pursuant to an NVOCC Service Arrangement (NSA) filed

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<sup>1</sup> Prior to OSRA, contract rates were published in the essential terms tariff publication, thereby allowing similarly situated shippers to request and obtain similar terms. In enacting OSRA, Congress limited the essential terms publication to the following terms: the origin and destination port ranges, the commodities, the minimum volume or portion, and the duration.

with the Commission and the essential terms are published in the NVOCC's tariff. 46 CFR 531.1, 531.5, and 531.9.

On February 29, 2016, the Commission issued an Advance Notice of Proposed Rulemaking (ANPR) to elicit public comment regarding its regulations in Part 530, Service Contracts, and Part 531, NVOCC Service Arrangements. In drafting the ANPR, President Obama's Executive Order 13563 served as guidance for the Commission in seeking ways in which the regulations should be modified, expanded, or streamlined in order to make the regulations more effective, reduce the regulatory burden, encourage public participation, make use of technology, and consider flexible approaches, keeping in mind the FMC's mission, strategic goals, and regulatory responsibilities.

Eleven sets of comments were filed in response to the ANPR, which may be found on the Commission's website through the link to the FMC's Electronic Reading Room, above. Comments were received from Ascend Performance Materials; CEVA Freight LLC as agents for and on behalf of Pyramid Lines; Crowley Latin American Services, LLC, and Crowley Caribbean Service, LLC (Crowley); Global Maritime Transportation Services, Inc. (GMTS); Global Shippers Association; the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA); Oceaneering International Inc.; Shintech Inc.; UPS Ocean Freight Services, Inc., UPS Europe SPRL, UPS Asia Group Pte. Ltd. and UPS Supply Chain Solutions, Inc. (collectively, UPS); Unitcargo Container Line, Inc., and the World Shipping Council (WSC). Earlier, comments submitted in response to the Commission's Plan for Retrospective Review of Existing Rules pertaining to the subject rulemaking were filed by the NCBFAA and a group of major ocean carriers.<sup>2</sup> Those comments are also posted to the Commission's website

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<sup>2</sup> The commenting carriers consisted of thirty ocean carriers participating in the following agreements active at that time: the fourteen members of the Transpacific Stabilization Agreement; ten members of the Westbound

under Docket No. 16-05. The comments received thus far represent a broad swath of industry stakeholders, including vessel-operating common carriers (VOCCs), a major trade association, a tariff publishing and contract management firm, licensed NVOCCs and freight forwarders, registered foreign based NVOCCs, beneficial cargo owners (BCOs) and a shippers' association.

## **II. Discussion**

Below, on a section-by-section basis, is a discussion of issues on which the Commission requested public comment regarding the regulations governing service contracts and NSAs in 46 CFR parts 530 and 531, respectively.

### *Part 530 - Service Contracts*

#### *Subpart A – General Provisions*

##### *§ 530.3 Definitions.*

##### *§ 530.3 Affiliate.*

The Commission proposes adding a definition of affiliate in this section to provide clarity as well as consistency throughout the Commission's rules. FMC regulations currently define the term *affiliate* in the NVOCC Service Arrangements rules at §531.3(b) as two or more entities which are under common ownership or control by reason of being parent and subsidiary or entities associated with, under common control with, or otherwise related to each other through common stock ownership or common directors or officers.<sup>3</sup>

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Transpacific Stabilization Agreement; the six members of the Central America Discussion Agreement; the eleven members of the West Coast of South America Discussion Agreement; the five members of the Venezuela Discussion Agreement; three members of the ABC Discussion Agreement; the six members of the United States Australasia Discussion Agreement; and the three members of the Australia and New Zealand-United States Discussion Agreement.

<sup>3</sup> This definition also currently exists in the rules governing NVOCC Negotiated Rate Arrangements (NRAs). See § 532.3(e).

Comments received from the WSC, and separately from Crowley, as a member of the WSC, have no objection to the Commission's proposal to adopt with respect to service contracts, the foregoing definition of *affiliate* used in the NSA regulations. The WSC further asks that the Commission clarify that the adoption of the definition "does not preclude more specific definitions of that term in service contracts or tariffs, so long as those more specific definitions fall within the scope of the Commission's definition." As one example, the WSC opines that it would not foresee the Commission objecting to the inclusion in a service contract of a minimum level of common ownership between two shipper entities asking to be considered affiliates. The Commission does not presently object to an individual carrier narrowing the proposed definition of affiliate in its service contracts as described in the WSC's example.

UPS objects to adding the definition of affiliate to this Part and, instead, states that "the opposite course – removing the corporate ownership and control restriction for both VOCC Service Contracts and NVOCC NSAs - would be far more beneficial to commerce and competitiveness in the logistics industries." UPS further states that "there is no apparent benefit to anyone from restricting shipper 'affiliates' in NSAs to entities under common ownership and control." UPS notes that VOCC service contracts are not subject to the same corporate ownership restrictions for affiliates as NVOCCs under NSAs, which allows VOCCs to include as affiliates in their contracts various partners in the supply chain, such as buyers and suppliers, while NVOCCs may not. UPS believes that there should be an "equal playing field" between NVOCCs and VOCCs with respect to affiliates and suggests that removing the corporate ownership restriction rather than applying it to both NVOCCs and VOCCs would be the better approach.

GMTS has several concerns regarding the proposed definition of affiliate that were not addressed in the ANPR, namely: (1) whether existing contracts that do not comply will be grandfathered in, and if so, whether there would be limitations on extending those contracts' termination dates; (2) whether, if the Commission determines to add the proposed definition of affiliate, it would also consider adding the definition of shippers' association; and (3) asks how the Commission will address currently effective service contracts between a VOCC and multiple NVOCCs that are not affiliated under the proposed definition and are not part of an association.

While UPS, an NVOCC and freight forwarder, cites a perceived VOCC advantage gained by not having shipper affiliates restricted to common ownership or control in service contracts, in contrast, the WSC, which is comprised of ocean carriers representing approximately 90% of global liner vessel capacity, does not object to adding the proposed definition of affiliate to service contract regulations, noting that "the proposed definition is consistent with definitions that are often included in service contracts (either directly or through incorporation of proposed tariff definitions)." The advantage that VOCCs have over NVOCCs as a result of this inconsistent requirement seems unclear, given WSC's position and further request for clarification that any imposition of a minimum ownership percentage by a VOCC with respect to an affiliate in a service contract would not conflict with the proposed definition, should it be added.

Over the years, Commission staff has been contacted regularly by VOCCs with issues and questions stemming from a lack of clarity regarding appropriate criteria for affiliates participating in service contracts. Regulated entities have noted the existence of the definition of affiliate in both the NSA rules at § 531.3(b) and the NRA rules at § 532.3(e), along with the omission of the identical definition in the service contract regulations, and have expressed



confusion with this disparate treatment. This rulemaking seeks to address this dissimilarity, as the consistent application of regulatory requirements contributes to a more efficient regulatory process and therefore, absent evidence of harm to shippers or an undue regulatory burden on carriers, is in the Commission's interest.

While the Commission believes that the consistent application of common ownership or control criteria in determining whether two companies are affiliated lends validity to the concept of affiliation with respect to a shipper's status under a service contract or NSA, it does not propose to include a specific minimum ownership percentage in the definition of affiliate. The proposed definition in this section is broad enough to allow individual VOCCs the ability to stipulate a minimum ownership percentage at the service contract or tariff level, and ensures consistency with the definition in the Commission's rules governing NSAs in Part 531 and NRAs in Part 532.

Similarly, another government agency, the Securities and Exchange Commission, 17 CFR 230.405, defines an affiliate, of, or person affiliated with, a specified person, as a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified.

*§ 530.3(i) Effective date.*

FMC regulations require that a service contract or amendment cannot become effective prior to its filing with the Commission. In the ANPR, the Commission sought comment on whether it should amend the definition of effective date with respect to service contract amendments to allow the effective date of amendments to be prior to the filing date of the amendment.

In its comments, WSC stated that this change would “remove a regulatory obstacle to the timely implementation of commercial terms to which the shipper and the carrier have agreed.”

WSC notes that, not only are there over 500,000 service contract amendments filed annually, but filing activity surges during peak periods, and the current requirement delays implementation of agreed upon-terms. The WSC urges the Commission to move promptly toward finalizing a rule to implement this change. Crowley, which endorses the WSC comments, also states that it enthusiastically supports the Commission allowing service contract amendments to be filed up to 30 days after the terms of the amendment are agreed upon with the shipper.

Shintech Inc., a beneficial cargo owner (BCO), supports the proposed change to allow service contract amendments to be effective upon agreement of the parties with the filing occurring up to 30 days later. If finalized, Shintech states that this proposed rule change “would provide our industry with much needed modifications to a system that no longer reflects the practical needs of maritime commerce.” Two other BCOs, Ascend Performance Materials and Oceaneering International Inc. also support a 30-day grace period for filing service contract amendments, as does Global Shippers Association. CEVA, an agent for registered foreign NVOCC Pyramid Lines, supports allowing up to 30 days after agreement of the parties for amendments to both service contracts and NSAs to be filed with the Commission.

Unitcargos Container Line, Inc., a licensed NVOCC, “applauds” the Commission’s efforts to review and simplify its regulations relating to service contracts and NSAs. Unitcargos believes that the proposed changes to the regulations relating to the periods of time within which ocean carriers and NVOCCs may file amendments and corrections to service contracts and NSAs, would undoubtedly reduce the associated regulatory burdens and lauds those changes for

“making it possible for ocean carriers and NVOCCs to keep pace with the often turbulent ocean shipping marketplace.”

UPS commended the Commission “for examining possible approaches to increase efficiency in the industry.” UPS believes that the Commission should allow service contracts, NSAs, and amendments to be filed and the corresponding essential terms to be published “within a reasonable time after the effective date, rather than in advance.” UPS explains that “[i]n many instances, shippers approach carriers with potential business opportunities that involve complex arrangements, including transactions covering multiple levels of a supply chain.” UPS emphasizes that “[i]t is critical to the shippers and carriers to be able to implement these arrangements rapidly, in order to assist the U.S. exporter or supply chain manager to meet competitive conditions or avoid port congestion.” UPS states that the requested regulatory relief “will facilitate transactions and encourage compliance, rather than incentivizing participants to try to structure transactions to avoid regulation.”

In its comments, the NCBFAA supports the Commission’s proposal to ease the service contract amendment filing requirements to allow filing up to 30 days after agreement and requests that the Commission provide that same regulatory relief to NSAs. NCBFAA, however, also believes that the relief discussed in the ANPR is not expansive enough to provide meaningful relief to NVOCCs and urges the Commission to completely eliminate its NSA essential terms publication and filing requirements.

GMTS expressed that the current requirement that a service contract amendment must be filed with the Commission on or before its effective date “ensures that the checks and balances of the full compliance of the tariffs, contract and amendments are determined prior to their submission.” GMTS further states that “[s]hould the proposed change to amendments be

permitted, it could be possible that sizeable shipments of cargo are moved prior to the determination of the amendment being fully compliant.” As an example, GMTS highlights the VOCC’s need to verify that an NVOCC shipper and its affiliates are in good standing with Commission requirements, and observes that, should the VOCC only verify their status at the time of filing the amendment, the delay between implementation and filing could result in a non-compliant amendment with an NVOCC whose license has been revoked.

The majority of commenters to the ANPR favored the Commission introducing regulatory flexibility by allowing up to 30 days for filing after an amendment to a service contract has been agreed to by the carrier and shipper. Some commenters also advocated extending that relief to original service contract filings and NSA amendments as well. The Commission is considering the potential impact of a 30-day delay in receiving service contract amendments after their implementation, in light of its investigative needs and oversight responsibilities and seeks to balance those against any regulatory burden that might be imposed by the requirement.

The existing regulations protect the shipper’s interests by demonstrating the agreement of the parties prior to the movement of the cargo. Shippers have expressed confidence in this process knowing that both the shipper and carrier will honor the commitment of their service contract filed with the FMC. The Commission notes a distinction between an original service contract filing and an amendment to a contract. An original service contract is a comprehensive agreement between the parties that encompasses the commodities that are to be shipped, the origins and destinations between which cargo is to move, the rates for the transportation of that cargo, as well as terms and conditions governing the transportation of goods for the shipper. Amendments to service contracts, on the other hand, are more limited in scope, generally adding

new commodities and/or rates. Numerous commenters support more flexibility in filing service contract amendments, which they contend will not diminish the effectiveness of the Commission's oversight of service contracts.

In considering the impact on all parties, the Commission is seeking comments on its proposal to allow the filing of sequential service contract amendments in the SERVCON system within 30 days of the effective date of the agreement reached between the shipper and carrier. The Commission is not proposing to allow a 30-day delay for filing of original service contracts however, given their nature and the Commission's belief that doing so would diminish its oversight abilities. Further, the Commission is seeking comment on GMTS' concerns regarding the impact of a 30-day delay in filing service contract amendments on compliance with § 530.6 and § 515.27. At this time, the Commission does not believe that these concerns outweigh the benefits of the proposed 30-day filing period. Finally, the Commission is proposing to amend certain definitions that require updating to reflect the current bureau and office names, more specifically those in § 530.3(d) and (o).

*§ 530.5 Duty to file.*

The Commission sought comment in the ANPR on amending its regulations to ensure that carriers are aware of the availability of the automated "web services" process for filing service contracts and amendments. In response to an industry request, the Commission developed an automated web services process in 2006, which allows service contracts, NSAs and their amendments to be filed directly from a carrier's contract management system into SERVCON, thereby reducing the regulatory burden associated with manual processing. "Pushing" the unique data already entered in the filer's contract management system directly to

the SERVCON system eliminates the time, expense and opportunity for data entry errors involved in manually logging into SERVCON and filing service contracts and NSAs.

The Commission has encouraged the use of web services by ocean carriers throughout the years, and the pace of new carriers implementing its use has recently increased. While it was previously estimated, based on carrier and tariff publisher projections of web services implementation, that the vast majority of service contracts and amendments would be filed using web services by April 1, 2016, due to delays in software programming and other issues, only 35% are presently using this option.

The Commission received one comment regarding web services. Global Maritime Transportation Services, Inc., which files service contracts on behalf of multiple carriers, has no objection to the Commission making carriers aware of the availability of the automated web services process. However, it questions whether amending the regulations is necessary given that the percentage of filings by April 2016 through this option is anticipated to be over 90%. GMTS also questions whether it is the Commission's intent to make filing using web services mandatory.

The Commission does not propose to make the web services option mandatory, as it is a technology that is more advantageous to high volume filers who use automated contract management systems. Given the gradual pace of adoption of web services, highlighting it in the Commission's rules would provide a public benefit. Accordingly, the Commission proposes to add regulatory language which makes filers aware of the option to use web services when filing service contracts, NSAs and amendments.

*§ 530.6 Certification of shipper status.*

This section sets forth the requirement that shippers entering into service contracts certify their status and requires VOCCs to obtain proof of an NVOCC's compliance with tariff and financial responsibility requirements. Carriers regularly use the FMC website, [www.fmc.gov](http://www.fmc.gov), to verify whether or not an NVOCC contract holder or affiliate is in good standing. Many carriers employ more rigid standards in certifying NVOCC status by requiring copies of the NVOCC's bond as well as the title pages of its published tariffs. In addition, many VOCCs include the NVOCC's 6-digit FMC Organization Number in the service contract, which indicates that the VOCC sought to ensure compliance with the requirements of § 530.6.

Commission staff is regularly asked by carriers about the FMC's electronic systems' capability to automatically verify compliance with § 530.6 by determining the current status of an NVOCC party named in a service contract or amendment. While the Commission's SERVCON system does not currently have this capability, the Commission may be able to add such functionality in the future.

The Commission asked for comment in the ANPR on whether the Commission should move forward in requiring filings to include the 6-digit FMC Organization Number for NVOCCs who are a contract holder or affiliate in a service contract by one of two options, namely:

- (1) adding a data field in the Commission's electronic filing system (SERVCON) in order to enter the 6-digit FMC Organization Number when an NVOCC is party to a contract; or
- (2) requiring that service contracts be formatted to contain metadata that includes the 6-digit FMC Organization Number for each NVOCC that is a contract holder or affiliate in a service contract.

The Commission pointed out in the ANPR that simply including an NVOCC party's FMC Organization Number in the body of a service contract would not allow the FMC's SERVCON system to verify NVOCC status. Only adding a data field to the SERVCON filing process wherein filers would enter the NVOCC party's Organization Number or the approach of adopting a standard service contract format to include metadata that includes the NVOCC party's Organization Number would allow the FMC to perform an automated verification of status.

With respect to the first option, a new data field in SERVCON would require a VOCC to enter the NVOCC's 6-digit FMC Organization Number when an NVOCC is a contract holder or affiliate. If multiple NVOCCs are parties to a service contract, each NVOCC's respective Organization Number would be required to be entered into this field. The Commission may be able to enhance SERVCON to automatically determine at the time a contract or amendment is uploaded for filing, whether the NVOCC is in good standing with the Commission. Upon development, a message would be transmitted to the filer notifying it if any of the NVOCC parties are not in good standing. The development of such an automated process could potentially save carriers a substantial amount of time currently spent manually verifying an NVOCC's status.

Under the second option, a standard service contract format would have to be adopted by all ocean carriers, allowing "metadata" to be incorporated into the service contract format to include the 6-digit FMC Organization Number of all NVOCC parties.<sup>4</sup> This option would

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<sup>4</sup> "Metadata is structured information that describes, explains, locates, or otherwise makes it easier to retrieve, use, or manage an information resource. Metadata is often called data about data or information about information." National Information Standards Organization (NIST), *Understanding Metadata*, NIST Press (2004), available at: <http://www.niso.org/publications/press/UnderstandingMetadata.pdf> (last visited June 17, 2016).



require a substantial amount of Commission information technology resources to develop and implement, including resources that would need to be allocated to SERVCON system programming. With the required programming implemented, however, it is likely that this technology could be leveraged to identify during the filing process service contracts or amendments not in compliance with § 530.6. If a service contract is not compliant, an alert could be sent to the carrier filing the contract or amendment.

The Commission received comments from Crowley, WSC and GMTS on this issue. Crowley supports “modifications to the SERVCON system that facilitate verification of a service contract signatory’s NVOCC status by inputting the signatory’s FMC-assigned, six-digit Organization Number.” Crowley opposes, however, “any requirement to imbed the Org. No. in the service contract metadata, or any change to SERVCON that would require service contract filers to input an Org. No. but did not provide immediate and definitive feedback on the status of the contract signatory.” GMTS supports the options put forth by the Commission in the ANPR but asks for clarification regarding how a rejection would be handled, whether a multiple NVOCC contract is voided if only one NVOCC lacks legal status, and asks if the FMC could provide a daily list of non-compliant parties. The WSC requests more detailed information as to how the proposed SERVCON changes would work before fully endorsing the Commission’s proposal on verifying a NVOCC contracting party. WSC is concerned that the Commission’s proposal might be too cumbersome, outweighing any advantage to be gained. They advise for example, “if a VOCC could simply add the Organization Number of an NVOCC service contract party into a specified field in SERVCON, and the system would then generate either a ‘green light’ or ‘red light’ response, then such a system would have the potential to simplify compliance and reduce costs.” WSC would not, on the other hand, support a reconfiguring of SERVCON

requiring a uniform structuring of service contracts in order to pull “metadata” to verify NVOCC status.

It is not the Commission’s intent for verification of NVOCC status through technological enhancements of the SERVCON system to result in rejection of service contracts. If implemented, it is contemplated that the new technology would simply provide carriers with timely information on which they could act to achieve greater compliance in a less burdensome manner. *See* 46 CFR 530.6(d) (regarding carrier reliance). The system could allow filers to receive a message during the filing process identifying any NVOCC shipper or affiliate that is not in good standing with the Commission’s licensing, registration or financial responsibility requirements. The Commission notes that comments regarding standardization of service contract format to include metadata indicate that such an approach would be considered by filers to be so cumbersome as to outweigh the potential benefits. The Commission, therefore, proposes to add an additional field in its SERVCON filing system which requires the input of an NVOCC’s six-digit Organization Number when they are the contract holder or affiliate. If there are multiple NVOCC parties to a service contract, the filer would be required to input the six-digit Organization Number of all NVOCCs.

The Commission contemplates that, upon completion of necessary SERVCON programming, this data would be corroborated against FMC’s database systems and return a message to the filing party if the NVOCC is not in good standing. Completing this process would satisfy the due diligence requirements in § 530.6.

#### *Subpart B – Filing Requirements*

##### *§ 530.8 Service Contracts.*

In the comments submitted by thirty ocean common carriers in response to the Commission's Plan for Retrospective Review of Existing Rules, a number of the carriers cite the filing of service contract amendments as the largest administrative burden for both carriers and their customers. Many ocean carriers believe that the service contract effective date requirement is overly burdensome and restrictive given current commercial practices, particularly with respect to amendments to contracts. The carriers maintain that filing amendments within 30 days would enable shippers and carriers to apply agreed-upon terms immediately and thus do business without disrupting or delaying that business. Of note, the proposed change in the definition of effective date would only affect the filing date of the amendment, as the parties must still agree to the rates and/or contract terms prior to receipt of the cargo. Comments regarding whether the Commission should allow filing of service contract amendments up to 30 days after agreement by the parties have been summarized previously under the discussion of § 530.3(i), Effective date.

This section relates to the implementation in the SERVCON system of the method whereby carriers could file service contract amendments up to 30 days after agreement, should the Commission take that action. To facilitate this discussion, the Commission sought comment in the ANPR on whether it should revise its regulations to allow: (1) a service contract amendment to be filed individually and sequentially within 30 days of its effectiveness; or (2) any number of service contract amendments to be consolidated into a single document, but filed within 30 days of the effective date of the earliest of all amendments contained in the document.

A more detailed explanation of the manner in which service contract amendments are presently filed into the FMC's SERVCON system may be useful to evaluate the two approaches. Currently, SERVCON is designed to process the filing of the initial service contract as

Amendment “0,” with subsequent amendments to the contract numbered sequentially, beginning with Amendment No. “1.” Each amendment requires that the filer enter the corresponding effective date of that amendment. If the Commission determines to allow amendments to be filed up to 30 days after agreement and the existing filing process is maintained involving the sequential filing of amendments starting with Amendment No. 1, then little, if any, programming changes may be required in SERVCON. With that approach, the only difference from the present process would be that the effective date entered could be up to 30 days prior to the filing date.

The alternative approach on which the Commission requested comments was the possibility of consolidating multiple service contract amendments into a single document. This was considered because the carriers also proposed aggregating several contract changes in a single amendment in what, in effect, could be a monthly filing. In a monthly filing of this type, it would still be necessary for carriers to specify the effective date of each amendment to the contract. Adding to this complexity, we note that the rate may change more than once in a monthly period. The SERVCON system is not presently capable of processing multiple amendments consolidated into a single document, e.g., Amendment Nos. 2 through 10, with multiple effective dates. Thus, this approach would require a substantial amount of reprogramming to enable the system to capture both the effective dates and amendment numbers. Further, based on input from the Commission’s Office of Information Technology, carriers would still need to manually input the effective date of each amendment into SERVCON. Therefore, absent the requisite reprogramming, this process could possibly result in more, rather than less, of a filing burden. Consolidating several service contract amendments may also prevent carriers from using the Commission’s web services technology in accordance with §

530.5, thereby offsetting the advantages of this technology, which does not require manual input and is intended to streamline processes and reduce the burden of filing.

In this regard, the WSC commented:

On the issue of whether the Commission should allow multiple service contract amendments to be filed in a single document, such a process would provide the greatest relief and would potentially be the most efficient. Based on the discussion in the ANPRM, however, it appears that there may be substantial SERVCON re-programming requirements associated with such functionality. Absent such re-programming, the Commission has suggested that filing multiple amendments in a single document may require substantial manual data input by carriers.

The WSC added that “the primary focus should be on providing a 30-day period in which to file service contract amendments.” WSC clarified that, while it would be “ideal” to accommodate multiple amendments in a single document, “if creating the ability to file multiple amendments in a single document would require a cumbersome manual process, then such a process would not be attractive.”

Crowley commented, “[w]hen an amendment makes multiple changes that were effective on different dates, Crowley envisions that the amendment itself would reflect the effective date of each change, thereby avoiding any need to alter the Commission’s SERVCON filing system.” “However,” Crowley adds that it “would be open to alternative filing approaches, provided that any approach eventually adopted minimizes the burden on the industry.”

GMTS suggests “a more effective administration of the contract process” and encourages a “rule making by the FMC that would specifically allow for electronic acceptance of an amendment, as is the case with NRA’s.” GMTS also expresses concern “that by allowing filings to take place after the effective date it undermines the public record process and obscures activity.” GMTS adds that it is “also concerned that relaxing this requirement does not address issues, which would come to light especially if the FMC adopts the suggestion of including the NVOCC registration number into the filing of contracts.”

The Commission notes that it would require significant programming time and considerable expense to update the SERVCON system to allow for multiple amendments to be filed in a single document at one time. Another suggestion of noting disparate effective dates within the service contract amendment alongside each change does not facilitate Commission review of contract amendments and could lead to confusion in ascertaining effective dates of changes. Therefore, the Commission proposes maintaining its existing requirement requiring sequential amendments to service contracts with a single effective date for all changes within that amendment, but also proposes allowing for those amendments to be filed up to 30 days after they have been concluded by the carrier and shipper.

*§ 530.10 Amendment, correction, cancellation, and electronic transmission errors.*

The carriers’ comments discussed in the ANPR noted that the current service contract correction procedures are outdated, and they maintained that these procedures are “ill suited” to the manner in which service contracts are employed today. The carriers requested a number of revisions to these requirements. The ANPR sought comment regarding service contract correction requests, corrected transmissions, and a proposed “conforming amendment.” An item by item discussion follows.

### *Electronic Transmission Errors*

The carriers' request that the Commission allow a 30-day grace period in which a carrier would not be required to file a service contract correction request (seeking retroactive effectiveness to correct a clerical or administrative error) or a formal amendment to the contract (effective upon filing or in the future). Rather, carriers would be permitted to submit a new type of filing, designated as a "conforming amendment" or similar special designation in order to retroactively correct a "typographical or clerical error".

The Commission questions whether this process would, in effect, replace the service contract correction process in § 530.10(c) within the first 30 days after filing. That process provides a means for carriers to correct a clerical or administrative error within 45 days of filing by submitting, among other things, an affidavit and other documentation used for verification purposes that establishes the nature of the error and the parties' intent. The carriers' suggested procedure would seem to eliminate the requirement for such documentation for a correction filed within 30 days of the contract's filing

In this regard, a service contract or amendment can currently be corrected through a Corrected Transmission. Pursuant to § 530.10(d), *Electronic transmission errors*, carriers may file a "Corrected Transmission" (CT) within forty-eight (48) hours of filing a service contract or amendment into SERVCON, but only to correct a purely technical data transmission error or a data conversion error that occurred during uploading. A CT may not be used to make changes to rates, terms or conditions.

While the vast majority of service contracts are uploaded into the Commission's electronic filing system, SERVCON, without encountering any problems, staff has noted that, when errors do occur, many times carriers do not discover the error until after the initial 48-hour

period has passed. Most of these mistakes are attributable to data entry errors on the SERVCON upload screen (e.g., the incorrect amendment or service contract number is entered, an incorrect effective date is typed, or the wrong contract or amendment is attached for uploading). Staff verifies that these are indeed purely clerical data errors that do not make changes to rates, terms, or conditions prior to accepting the CT filings. While incorporation of web services filing would reduce the occurrence of many of the technical and data transmission errors leading to a Corrected Transmission, the Commission is seeking comments on whether the current 48-hour period in which to file a CT after filing the original contract or amendment should be extended to thirty (30) days to afford carriers with a more realistic time frame to correct purely technical data transmission errors.

In its comments, GMTS supports extending the time period in which to submit a Corrected Transmission for an electronic transmission error from 48 hours to 30 days. WSC and Crowley agree that the 30-day period for a CT is more realistic, and believe that extending the filing period would “enhance the accuracy of filed service contract information without affecting regulatory purposes.”

As a Corrected Transmission is limited only to correcting a purely technical data transmission error or a data conversion error that occurred during uploading in SERVCON, and may not be used to make changes to rates, terms or conditions, the Commission proposes extending the time frame in which to file a Corrected Transmission from 48 hours to 30 days.

#### *Extend Filing Period for Correction Requests to 180 Days*

The Commission requested comment regarding whether it should extend the time period for filing a service contract correction request from forty-five (45) to one-hundred eighty (180) days after the contract’s filing. The Commission is aware that an error in a service contract may



not be discovered until after cargo has moved, been invoiced on the bill of lading, and, the shipper notes that the rate assessed is not the agreed upon rate. Given long transit times due to carriers' global pendulum services and slow steaming, in many cases this type of error is not discovered until well after 45 days has transpired. In other cases, shippers engage in audits of bills of lading that identify errors in the service contract that do not match the rates offered. These audits may be well after the 45-day period. To provide needed flexibility in this process, the Commission has considered whether a longer time period in which to file is appropriate.

Comments filed by WSC, Crowley and GMTS all support extending the time in which to file a service contract correction request from 45 days to 180 days. WSC noted that "the nature of some services, in conjunction with the time involved in the issuance of an invoice by a carrier and the review of that invoice by a shipper (the process through which errors are likely to be discovered) makes the existing 45-day period inadequate in many circumstances." WSC also believes that the Commission's regulations "should support the parties' interests in having their commercial agreements implemented, and allowing additional time to discover and correct mistakes would further that purpose and reduce disputes." No comments were filed objecting to this requested change.

The Commission recognizes that the discovery of a mistake made in a service contract which is contrary to the agreement of the parties may not necessarily occur within a short time after the cargo has moved. In addition, auditing of freight bills by shippers can be delayed as well. Commission staff is occasionally contacted by carriers who wish to correct a service contract error which was not discovered until the present 45-day time limit for correction requests has expired. In such cases, no regulatory remedy exists and the parties must make a commercial accommodation in the service contract to address the problem. Given the foregoing,

including the lack of objections to this request, the Commission proposes extending the time period in which to file a service contract correction request from 45 days to 180 days.

*Extend the Service Contract Correction Procedure to Include Unfiled Contracts and Amendments*

The ANPR requested comment on various aspects of the requests posed in the ocean carriers' comments. The ocean carriers requested that the Commission allow the correction process to also be utilized for unfiled service contracts and service contract amendments. The Shipping Act requires that service contracts be filed with the Commission. 46 U.S.C. § 40502. Shippers have expressed to the Commission that they believe a filed contract provides them with assurance that the rates and terms of the service contract will be adhered to by both the shipper and carrier.

GMTS was the only party to comment on this issue. It supports extending the service contract correction process to include unfiled service contracts and amendments, provided that the affidavit process is maintained "in order to establish a verifiable error was clerical or systems but not intentional."

The Commission has an interest in granting flexibility in the regulatory process where public benefits outweigh the costs. The changes proposed regarding the extension of time for electronic transmission errors and for filing service contract correction requests should provide needed flexibility. However, extension of the service contract correction process to address a carrier's failure to file a service contract or amendment with the Commission would undermine the statutory filing requirement and shippers' reliance on that requirement. The Commission, therefore, does not propose extending the service contract correction process to include unfiled service contracts and amendments.

### *Eliminate Carrier Affidavit and Significantly Reduce Filing Fee*

The ANPR sought comment on the carriers' request to the Commission to eliminate the affidavit requirement for service contract correction requests and also significantly reduce the filing fee. The filing fee reflects time expended by Commission staff to research and verify information provided in the correction request and to conduct its analysis.

The Commission is not proposing any changes to the affidavit requirement but is considering reducing the fee as part of its rulemaking under FMC Docket No. 16-06, Update of Existing and Addition of New User Fees, in which a Notice of Proposed Rulemaking (NPRM) was issued on May 27, 2016. 81 FR 33637. The affidavit requirement is a critical component in establishing and verifying the facts surrounding an error, while streamlining Commission staff's review and analysis of the correction request. In the only comment filed concerning this matter, GMTS supports reducing the filing fee on the condition that the Commission maintain the affidavit requirement.

The Commission estimated in the User Fee NPRM that it could reduce the filing fee from \$315 to \$95 by streamlining its internal processes, provided that the affidavit requirement is not eliminated. If the affidavit requirement were eliminated, staff time researching and verifying information would increase, and thus, the filing fee would need to be increased commensurate with the additional time required for processing and analysis.

### *Subpart C – Publication of Essential Terms*

#### § 530.12 Publication.

During discussions with stakeholders held prior to the initiation of this rulemaking, several advised the Commission that essential terms publications were no longer accessed by the

public or useful. However, other stakeholders indicated that they do rely on them for various purposes, such as during a grievance proceeding.

GMTS was the only commenter to respond to the ANPR regarding the essential terms publication requirement. GMTS does not support any changes to the current essential terms requirements. GMTS suggests that the essential terms publication provides critical volume and commodity information and fills both a commercial and compliance need without which there would be a diminution of the public record.

The Commission does not propose modifying its rules regarding the publication of essential terms.

#### *Subpart D – Exceptions and Implementation*

##### *§ 530.13 Exceptions and exemptions.*

##### *§ 530.13(a) Statutory exceptions.*

Commission rules in this section identify the commodities that are exempt from the tariff publication and service contract filing requirements of the Shipping Act. See 46 U.S.C. 40501(a)(1) and 40502(b)(1). Commodities that are presently exempt pursuant to the Act are bulk cargo, forest products, recycled metal scrap, new assembled motor vehicles, and waste paper or paper waste.

In response to the ANPR, WSC reiterated its support of the comments submitted previously by the ocean common carriers that recommended the FMC expand the list of exempt commodities pursuant to the Commission’s exemption authority contained in Section 16 of the Act, 46 U.S.C. 40103. As WSC explains, “the basis for this proposal is that the commodities for which exempt status is requested may be moved in bulk or by tramp vessels, and that the exemption would provide flexibility that would increase competition for those cargoes.” WSC

supports the carriers' proposal to add the following commodities to the list of exempt commodities: grain, soybeans, meal, flour, corn products, cotton, resins, coffee, animal feed, seeds, food additives, clay, hay, hides and plastic scrap.

In addition to the commodities identified by the WSC, Crowley requests the exemption of fruits, vegetables and other agricultural products as well. Crowley asserts that these commodities are, similar to the existing exempt commodities, "subject to transport by bulk or reefer operators that, in many cases, are not subject to FMC regulation." Crowley claims that U.S. importers and exporters would benefit should the Commission exempt these agricultural commodities.

GMTS, a tariff and contract management firm that files service contracts in SERVCON for numerous VOCC clients, stated that they are "concerned that the introduction of additional commodities to the exempt commodity list would make it difficult if not impossible to produce a relevant index on these commodities." In their experience, GMTS asserts, some of the commodities proposed for inclusion in the exempt commodities list tend to be seasonal, are contracted on an annual basis with limited changes, and therefore, do not involve a large number of contract amendments. GMTS stated that they reviewed hundreds of VOCC service contracts in their filing system that included the new commodities proposed for exemption, and found that contracts comprising shipments of a single commodity, such as seed or soybean alone, had very few contract amendments. GMTS is concerned with the potential "expansion of the exempted commodity list and its impact on reliant analysis should these commodities be removed from the reporting process."

The Commission has a number of concerns regarding expansion of the list of exempt commodities. Of note, two of the highest paying commodities in terms of freight rates in the U.S. export trade are among those proposed for exemption by WSC and the ocean carriers, namely,

refrigerated cargoes and cattle hides. Exporters of currently exempt commodities have expressed frustration to the Commission regarding the ocean carrier practice of offering exempt commodity tariff rates with periods of limited duration, in some cases for only thirty to sixty days, rather than for the longer periods that are customary in service contracts. Further, exempt commodity tariffs are not published and do not provide shippers with thirty days' notice prior to implementation of rate increases. Whereas service contracts allow shippers to negotiate rates and terms with carriers to tailor services and terms to the shipper's specific needs, many exporters advise that exempt commodities are not afforded this opportunity.

Given the potential disadvantage to shippers in negotiating with ocean carriers for transportation of exempt commodities, and the lack of shipper support for exempting additional commodities, the Commission does not propose exercising its exemption authority to add new commodities to the list of those exempted from the FMC's tariff publication and service contract filing requirements.

The Commission is proposing, however, to amend § 530.13(b)(2), to reflect the change in name of the relevant Department of Defense entity from Military Transportation Management Command to Surface Deployment and Distribution Command.

#### *§ 530.14 Implementation.*

If the Commission adopts the proposal to allow up to 30 days for filing service contract amendments after agreement of the parties, corresponding changes would be made to § 530.14. Refer to the discussion under § 530.3(i), Effective date.

### *Part 531—NVOCC Service Arrangements*

#### *Subpart A – General Provisions*

##### *§531.1 Purpose.*

In response to the ANPR, NCBFAA echoes its earlier comments regarding the Commission’s Plan for Retrospective Review of Existing Rules and its petition for rulemaking in FMC Docket No. P2-15.<sup>5</sup> NCBFAA supports the Commission’s consideration of regulatory changes focused on reducing unnecessary regulatory burdens and easing compliance by potentially allowing more time to process amendments to service contracts and NSAs, and to correct technical or substantive errors made in filings. NCBFAA believes that the current service contract and NSA filing requirements are ill suited to keeping pace with the “dynamic nature of the ocean shipping marketplace in this post-OSRA environment” and requests that any regulatory relief granted by the Commission to VOCCs with respect to their service contract requirements also be extended to the NVOCC NSA requirements.

NCBFAA argues that justification for relief to NVOCCs is even more compelling than that of VOCCs, given the challenges NVOCCs face reacting to the daily rate and surcharge changes being made by VOCCs that an NVOCC utilizes for transporting its clients’ cargo. NCBFAA states that NSAs are significantly underutilized by NVOCCs and asserts that NSA filing statistics clearly indicate that NSAs have not been commercially accepted. However, those NVOCCs using NSAs face similar pressures as VOCCs to timely file. Thus, NCBFAA supports Commission efforts to ease NSA requirements with respect to the timing of amendment filings. The group does not believe, however, that such efforts are far reaching enough.

In fact, NCBFAA reminds the Commission that it has been “urging the Commission to eliminate the NSA publication and filing requirements since their inception.” While recognizing that VOCCs and NVOCCs are both common carriers, NCBFAA asserts that the Commission’s

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<sup>5</sup> NCBFAA filed a petition for rulemaking on April 18, 2015. See Docket No. P2-15, *Petition of the National Customs Brokers and Forwarders Association of America, Inc. for Initiation of Rulemaking* (NCBFAA Petition). The Commission has accepted the NCBFAA Petition and will address the proposals presented therein during a subsequent rulemaking proceeding.

introduction of NSA filing requirements was only to “maintain the superficial parity in the way VOCCs and NVOCCs are regulated” and claims that such parity “is not warranted because VOCCs and NVOCCs are not similarly situated and their activities are quite different. NCBFAA emphasizes that NVOCCs do not enjoy antitrust immunity and therefore do not have “collectively established boilerplate terms and conditions or consider, let alone follow, ‘voluntary guidelines’ relating to pricing or service conditions.” NCBFAA advocates that, inasmuch as there are situations where NVOCCs and their customers would like to enter into more formal, long-term arrangements, which cannot be accomplished through NRAs, the industry would benefit by having the Commission reexamine the need for continuing the filing of NSAs and the publication of essential terms. NCBFAA further urges the Commission to allow NRAs, which unlike NSAs are not filed with the FMC, to include “non-rate economic terms, including credit and payment terms, rate methodology, minimum quantities, forum selection and arbitration clauses.”

Unitcargo Container Line, Inc., an NVOCC, submitted comments paralleling those of NCBFAA inasmuch as they support changes to NSA regulations that would allow more time for filing NSA amendments. It also urges the Commission to completely eliminate the NSA filing and publication requirements and allow for the inclusion of non-economic terms in NRAs. Unitcargo states that it and its customers prefer using NRAs, noting that many of its shippers find NSAs “unnecessarily formal and burdensome.”

UPS strongly opposes the position taken by NCBFAA, commenting that “NCBFAA appears to suggest that the provisions in the Commission’s regulations for NSAs filed with the Commission ought to be phased out in favor of exclusive use of unfilled NSAs.” UPS maintains that NCBFAA’s suggested approach “would do damage to larger volume NVOCCs that have



built their core service arrangements around the NSA format.” UPS describes the distinctions between NSAs and NRAs, stating “although the numbers of unfiled NRAs now in use are substantially larger than the number of NSAs filed annually, the NRAs are typically single-rate, single-lane, single-shipper arrangements, whereas NSAs often cover hundreds of rates on multiple global routes, as part of a multimodal master services arrangement for a shipper affiliate group, often covering continuing shipments over a period of time.” UPS goes on to say that “NVOCCs such as UPS make substantial percentages of their ongoing bookings utilizing NSAs, especially for large retailers, industrial shippers and government shippers.” While UPS supports Commission initiatives that would introduce flexibility into the current NSA regulations, they further advocate that “NSAs cannot simply be scrapped in favor of forcing NVOCCs that have developed complex competitive arrangements to revert to the use of NRAs that are not always suitable to meet the expectations of large-volume sophisticated shipper customers.”

CEVA Freight LLC, agents for Pyramid Lines, supports flexibility in filing amendments “so that the regulatory process does not delay the implementation of commercial agreements.” However, CEVA sees no reason why NSAs need to be filed with the Commission, advocating that the Commission can request an NSA from an NVOCC to fulfill FMC regulatory review needs. GMTS’ comments do not support elimination of the filing of NSAs.

The Commission will be addressing the request to eliminate the NSA filing and publication requirements in a future rulemaking addressing NCBFAA’s petition. Accordingly, the Commission takes no position at this time on the comments supporting such a change, and the Commission is moving forward with the proposed amendments to Part 531, described in detail below, in this rulemaking.

*§531.3 Definitions.*

*§531.3(k) Effective date.*

The Commission's regulations presently require that an NSA or amendment be filed on or before the date it becomes effective. In response to filed VOCC comments, the Commission is proposing to allow the filing of service contract amendments pursuant to Part 530 to be delayed up to 30 days after an amendment is agreed to by the contract parties. In order to relieve the filing burden on NVOCCs as well, the Commission is proposing to similarly allow amendments to NSAs to be filed up to 30 days after an amendment is agreed to by the parties.

The NCBFAA comments stated, "[j]ust as it is appropriate for the Commission to adopt the proposed changes in the service contract regulations, the agency should at least provide the same relief to NVOCCs with respect to NSAs."

UPS commends the Commission for examining possible approaches to increase efficiency in the industry and favors greater flexibility in the NSA regulations. UPS supports the concept of allowing contracts and amendments to be filed and essential terms publication to be completed within a reasonable time after the effective date, rather than in advance.

CEVA Freight, LLC, as agents for Pyramid Lines, supports the Commission permitting NVOCCs the "flexibility in filing amendments so that the regulatory process does not delay the implementation of commercial agreements." In addition, CEVA supports the Commission allowing NVOCCs to file multiple NSA amendments signed over a 30-day period in a single filing. GMTS does not support the filing of amendments to NSAs after the effective date of agreement of the parties.

The Commission invites further comments on these varying positions regarding up to the 30-day delay in filing NSA amendments. As discussed above, the Commission does not currently believe that GMTS' concerns outweigh the proposed 30-day filing period. With

respect to CEVA's comment to allow multiple amendments to be included in a single filing, the Commission is tentatively rejecting this recommendation for the same reasons discussed above in the service contract section. It would require significant programming time and considerable expense to update the SERVCON system to allow multiple amendments to be filed in a single document at one time, and, therefore, the Commission proposes maintaining its existing requirement that sequential amendments for NSAs be filed with a single effective date for all changes within that amendment. Those amendments could, however, be filed up to 30 days after they have gone into effect.

*§ 531.5 Duty to file.*

The Commission proposes to add regulatory language under §530.5 which makes service contract filers aware of the option to use web services when filing service contracts and their corresponding amendments. While no comments were received from NVOCCs regarding this matter, larger volume filers of NSAs may find it advantageous. The Commission wishes to avail NVOCCs of this option as well, and therefore, proposes to add similar regulatory language to this section to alert NSA filers of their ability to use web services to file NSAs and amendments, should they so choose.

*Subpart B – Filing Requirements*

*§ 531.6 NVOCC Service arrangements.*

Presently the Commission's regulations require that an NSA or amendment be filed on or before the date it becomes effective. As discussed above, the Commission is proposing to allow up to 30 days for filing NSA amendments after their effective date, and is proposing corresponding changes to § 531.6.

*§ 531.6(d) Other requirements.*

Pursuant to § 531.6(d)(4), an NVOCC may not knowingly and willfully enter into an NSA with another NVOCC that is not in compliance with the Commission's tariff and proof of financial responsibility requirements. As more fully discussed under § 530.6, above, the industry frequently refers to the Commission's website, [www.fmc.gov](http://www.fmc.gov), to verify whether or not an NVOCC contract holder or affiliate is compliant with these requirements.

The ANPR requested comment on different options that, upon development, would allow the FMC's SERVCON system to alert filers at the time of uploading service contracts, NSAs and amendments thereto, if an NVOCC contract signatory or affiliate is not in good standing. As discussed, the alert notifying the filer that an NVOCC is not in good standing is intended to leverage technology in order to assist filers with compliance and would not result in the rejection of a filing.

Given the comments discussed in § 530.6 above, the Commission proposes to add an additional field in its SERVCON filing system which requires the input of an NVOCC's six-digit Organization Number when they are the contract holder or affiliate. If there are multiple NVOCC parties to a service contract, the filer would be required to input the six-digit Organization Number of all NVOCCs.

*§ 531.6(d)(5) Certification of shipper status.*

The NSA regulations do not include a requirement that the NSA shipper certify its status, which is a requirement for shippers under current service contract regulations in Part 530. The Commission sought comment on whether to make this requirement consistent and uniform for NVOCCs and VOCCs. No comments were filed that addressed certification of shipper status in NSAs. The Commission's interest in ensuring that all NVOCCs in the supply chain are FMC licensed or registered, and as a consequence hold an OTI bond, provides greater assurance that

shippers will not be harmed by unfair or deceptive practices. Given the potential benefits, the Commission proposes to add a requirement that all NSA contract shippers and affiliates certify their shipper status.

*§ 531.8 Amendment, correction, cancellation, and electronic transmission errors.*

Under the Commission's regulations, VOCC service contracts and NVOCC service arrangements are agreements between a common carrier and a shipper for the carriage of cargo. Given these congruencies, the Commission is considering whether changes being proposed by the VOCCs to the correction procedures for service contracts should be handled in a similar manner for NSAs. A complete discussion of the changes requested with respect to service contract amendment, correction, cancellation, and electronic transmission errors is included in § 530.10 above.

To provide the same flexibility with regard to correcting errors in NVOCC NSAs as the Commission proposes for VOCCs service contract errors, the Commission proposes: (1) extending the time period in which to file a Corrected Transmission to remedy an NSA electronic transmission error under § 531.8(c) from 48 hours to 30 days and; (2) extending the time period for filing an NSA correction request under § 531.8(b) from 45 to 180 days.

*Subpart C – Publication of Essential Terms*

*§531.9 Publication.*

As noted previously, NCBFAA's comments requested that the Commission consider whether the NSA filing and the essential term tariff publication requirements are necessary, and requests the Commission eliminate those requirements. The other commenter on this matter, GMTS, does not support any changes to the current essential terms filing requirements.

The Commission will be addressing the request to eliminate the NSA publication requirements in a future rulemaking addressing NCBFAA's petition. Accordingly, the Commission takes no position at this time on the comments supporting such a change and is not proposing any changes to the NSA publication requirements as part of this rulemaking.

#### *Subpart D – Exceptions and Implementation*

##### *§531.10 Excepted and exempted commodities.*

The Commission sought comment on whether to treat VOCC service contracts and NVOCC service arrangements, as well as the tariffs of both, in a similar fashion with respect to exempted commodities. No specific comments were filed addressing this issue related to NVOCCs. As the Commission is not proposing to exercise its exemption authority under Section 16 of the Shipping Act to exempt additional commodities for VOCCs, it does not propose to do so for NVOCCs under this section.

The Commission is proposing however, to amend § 531.10(b)(2), to reflect the change in name of the relevant Department of Defense entity from Military Transportation Management Command to Surface Deployment and Distribution Command.

##### *§531.11 Implementation.*

Changes regarding the effective date of service contract amendments are being proposed by the Commission under Part 530. The Commission is proposing similar requirements for NSA amendments in Part 531 (NVOCC Service Arrangements).

### **III. Regulatory Notices and Analysis**

#### *Regulatory Flexibility Act*

The Regulatory Flexibility Act, 5 U.S.C. 601-612, provides that whenever an agency is required to publish a notice of proposed rulemaking under the Administrative Procedure Act

(APA), 5 U.S.C. 553, the agency must prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities, unless the head of the agency certifies the rulemaking, 5 U.S.C. 603, 605. Accordingly, the Chairman of the Federal Maritime Commission certifies that the proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities. The regulated business entities that would be impacted by the rule are vessel operating common carriers (VOCCs) and non-vessel operating common carriers (NVOCCs) that enter into service contracts and NVOCC service arrangements (NSAs), respectively, with shippers of cargo. The Commission has determined that VOCCs generally do not qualify as small under the guidelines of the Small Business Administration (SBA), while the majority of NVOCCs do qualify as small under the SBA guidelines. The Commission concludes, however, that the proposed rule would not have a significant impact on NVOCCs. In this regard, the rule pertains to an NSA entered into between a NVOCC and a shipper, which is an optional pricing arrangement that benefits the shipping public and relieves NVOCCs from the burden of the statutory tariff filing requirements in 46 U.S.C. 40501. The only proposed change that would increase the burden on NVOCCs is the proposed requirement to include the organization number for NVOCC shippers. Although this requirement would increase the filing burden associated with NSAs, the additional burden would be minimal. Specifically, as discussed in more detail below, the Commission estimates that only 10% of NSA filings would be affected by this proposed requirement and inputting the NVOCC shipper's organization number would add less than a minute to the filing time for affected submissions. As a result, the total additional burden imposed across all NVOCCs would only be 5 hours of additional filing time annually.

*Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521) (PRA) requires an agency to seek and receive approval from the Office of Management and Budget (OMB) before collecting information from the public. 44 U.S.C. 3507. The agency must submit collections of information in proposed rules to OMB in conjunction with the publication of the notice of proposed rulemaking. 5 CFR 1320.11.

The information collection requirements in Part 530, Service Contracts, and Part 531, NVOCC Service Arrangements, are currently authorized under OMB Control Numbers 3072-0065 and 3072-0070, respectively. If approved, this rule would require a VOCC that files a service contract or amendment thereto into the FMC's SERVCON system to also enter the 6-digit FMC Organization Number of any NVOCC shipper party or affiliate. The same requirement is being proposed for NVOCC Service Arrangement filings. In compliance with the PRA, the Commission has submitted the proposed revised information collections to the Office of Management and Budget.

The Shipping Act prohibits common carriers from accepting cargo from, transporting cargo for, or entering into a service contract with an ocean transportation intermediary that does not have a tariff and a bond. See 46 U.S.C. 41104(11)-(12). While current rules recognize several options by which service contract filers verify shipper status, 46 CFR 530.6(b) and 515.27(a)-(d), common carriers typically obtain the NVOCC's Organization Number prior to contract filing, in the course of verifying whether an NVOCC maintains a current tariff and bond. Indeed, twenty major VOCCs already collect and include this information in their filings. Therefore, the Commission estimates that the average time needed to input and submit this additional data item when transmitting filings to be minimal, i.e., less than one minute per filing.



Public burden for the collection of information associated with Part 530, Service Contracts, as revised, would encompass 103 likely respondents and an estimated 2,216,097 annual instances,<sup>6</sup> with an overall annual estimated burden of 89,775 total hours. The Commission estimates that approximately 45% of service contracts are entered into with NVOCC shippers, to which the proposed 6-digit organization number reporting requirement would apply. Consequently, of the 89,775 hours estimated annually for the Part 530 information collection, approximately 4,336 hours would be attributable to the new requirement proposed in this rulemaking.

Public burden for the collection of information pursuant to Part 531, NVOCC Service Arrangements, as revised, would comprise 79 likely respondents and an estimated 10,371 annual instances,<sup>7</sup> with an overall annual estimated burden of 839 total hours. The Commission estimates that approximately 10% of NSAs include NVOCC shippers, to which the proposed 6-digit organization number reporting requirement would apply. Of the 839 hours estimated annually for the Part 531 information collection, approximately 5 hours would be attributable to the new requirement proposed in this rulemaking.

*Comments are invited on:*

- Whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;

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<sup>6</sup> Annual instances include the filing of new service contracts and amendments, essential terms publication, notification/filing requirements, Form FMC-83, disclosure/third party, and record keeping/audit requirements. Of the total annual instances of 2,216,097, the number of service contracts and amendments combined is 642,309. Forty-five percent of those is 289,039.

<sup>7</sup> Annual instances include the filing of new NSAs and amendments, essential terms publication, notification/filing requirements, Form FMC-78, disclosure/third party, and record keeping/audit requirements. Of the total annual instances of 10,371, the number of NSAs and amendments combined is 3,249. Ten percent of those is 325.

- Whether the Commission's estimate for the burden of the information collection is accurate;
- Ways to enhance the quality, utility, and clarity of the information to be collected;
- Ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Please submit any comments, identified by the docket number in the heading of this document, by any of the methods described in the ADDRESSES section of this document.

#### *Regulation Identifier Number*

The Commission assigns a regulation identifier number (RIN) to each regulatory action listed in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Unified Agenda). The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. You may use the RIN contained in the heading at the beginning of this document to find this action in the Unified Agenda, available at <http://www.reginfo.gov/public/do/eAgendaMain>.

#### **List of Subjects**

##### *46 CFR Part 530*

Freight, Maritime carriers, Report and recordkeeping requirements.

##### *46 CFR Part 531*

Freight, Maritime carriers, Report and recordkeeping requirements.

For the reasons stated in the supplementary information, the Federal Maritime Commission proposes to amend 46 CFR parts 530 and 531 as follows:

## PART 530-SERVICE CONTRACTS

1. The authority citation for part 530 continues to read as:

**Authority:** 5 U.S.C. 553; 46 U.S.C. 305, 40301-41306, 40501-40503, 41307.

2. Amend § 530.3 by:

a. Redesignating paragraph (s) as paragraph (u);

b. Redesignating paragraphs (b) through (r) as paragraphs (c) through (s),  
respectively;

c. Adding new paragraph (b); and

d. Revising newly redesignated paragraphs (e), (j), and (p).

The addition and revisions read as follows:

### § 530.3 Definitions.

\* \* \* \* \*

(b) *Affiliate* means two or more entities which are under common ownership or control by reason of being parent and subsidiary or entities associated with, under common control with, or otherwise related to each other through common stock ownership or common directors or officers.

\* \* \* \* \*

(e) *BTA* means the Commission's Bureau of Trade Analysis or its successor bureau.

\* \* \* \* \*

(j) *Effective date* means the date upon which a service contract or amendment is scheduled to go into effect by the parties to the contract. For an original service contract, the effective date cannot be prior to the filing date with the Commission. For a service contract amendment, the effective date can be no more than thirty (30) calendar days prior to the filing

date with the Commission. A service contract or amendment thereto becomes effective at 12:01 a.m. Eastern Standard Time on the beginning of the effective date.

\* \* \* \* \*

(p) *OIT* means the Commission's Office of Information Technology or its successor office.

\* \* \* \* \*

3. Amend § 530.5 by revising paragraph (b) to read as follows:

**§ 530.5 Duty to file.**

\* \* \* \* \*

(b) Filing may be accomplished by any duly agreed-upon agent, as the parties to the service contract may designate, and subject to conditions as the parties may agree. The parties, or their duly agreed-upon agent, may utilize web services to transmit filings into the Commission's service contract electronic filing system (SERVCON).

\* \* \* \* \*

4. Amend § 530.6 by revising paragraph (b) to read as follows:

**§ 530.6 Certification of shipper status.**

\* \* \* \* \*

(b) *Proof of tariff and financial responsibility.* If the certification completed by the contract party under paragraph (a) of this section identifies the contract party or an affiliate or member of a shippers' association as an NVOCC, the ocean common carrier, conference or agreement shall obtain proof that such NVOCC has a published tariff and proof of financial responsibility as required under sections 8 (46 U.S.C. 40501-40503) and 19 (46 U.S.C. 40901-40904) of the Act before signing the service contract. An ocean common carrier, conference or agreement can

obtain such proof by the same methods prescribed in § 515.27 of this chapter. Alternatively, for each NVOCC that is a shipper, an affiliate or a member of a shippers' association, its 6-digit FMC Organization Number must be entered at the time of filing into the corresponding SERVCON field, which shall serve as such proof.

\* \* \* \* \*

5. Amend § 530.8 by revising paragraph (a) and paragraph (d) introductory text to read as follows:

**§ 530.8 Service contracts.**

(a) Authorized persons shall file with BTA, in the manner set forth in appendix A of this part, a true and complete copy of:

(1) Every service contract before any cargo moves pursuant to that service contract; and

(2) Every amendment to a filed service contract no later than thirty (30) days after any cargo moves pursuant to that service contract amendment.

\* \* \* \* \*

(d) *Other requirements.* Every service contract filed with BTA shall include, as set forth in appendix A to this part:

\* \* \* \* \*

6. Amend § 530.10 by revising paragraph (c) introductory text and the first sentence of paragraph (d) to read as follows:

**§ 530.10 Amendment, correction, cancellation, and electronic transmission errors.**

\* \* \* \* \*

(c) *Corrections.* Requests shall be filed, in duplicate, with the Commission's Office of the Secretary within one-hundred eighty (180) days of the contract's filing with the Commission, accompanied by remittance of a \$315 service fee and shall include:

\* \* \* \* \*

(d) *Electronic transmission errors.* An authorized person who experiences a purely technical electronic transmission error or a data conversion error in transmitting a service contract filing or amendment thereto is permitted to file a Corrected Transmission ("CT") of that filing within 30 days of the date and time of receipt recorded in SERVCON. \* \* \*

\* \* \* \* \*

7. Amend § 530.13 by revising paragraph (b)(2) to read as follows:

**§530.13 Exceptions and exemptions.**

\* \* \* \* \*

(b) \* \* \*

(2) *Department of Defense cargo.* Transportation of U.S. Department of Defense cargo moving in foreign commerce under terms and conditions negotiated and approved by the Surface Deployment and Distribution Command and published in a universal service contract. An exact copy of the universal service contract, including any amendments thereto, shall be filed with the Commission as soon as it becomes available.

\* \* \* \* \*

8. Amend § 530.14 by revising paragraph (a) to read as follows:

**§ 530.14 Implementation.**

(a) *Generally.* Performance under an original service contract may not begin before the day it is effective and filed with the Commission. Performance under a service contract

amendment may not begin until the day it is effective, provided however that amendments must be filed no later than thirty (30) calendar days after effectiveness.

\* \* \* \* \*

#### **§ 530.15 [Amended]**

9. Amend § 530.15 by removing paragraph (b) and redesignating paragraphs (c) and (d) as paragraphs (b) and (c), respectively.

### **PART 531-NVOCC SERVICE ARRANGEMENTS**

10. The authority citation for part 531 continues to read as:

**Authority:** 46 U.S.C. 40103.

11. Amend § 531.3 by revising paragraph (k) to read as follows.

#### **§ 531.3 Definitions.**

\* \* \* \* \*

(k) *Effective date* means the date upon which an NSA or amendment is scheduled to go into effect by the parties to the contract. For an original NSA, the effective date cannot be prior to the filing date with the Commission. For an NSA amendment, the effective date can be no more than thirty (30) calendar days prior to the filing date with the Commission. An NSA or amendment thereto becomes effective at 12:01 a.m. Eastern Standard Time on the beginning of the effective date.

\* \* \* \* \*

12. Amend §531.5 by revising paragraph (c) to read as follows.

#### **§ 531.5 Duty to file.**

\* \* \* \* \*

(c) Filing may be accomplished by any duly agreed-upon agent, as the parties to the NSA may designate, and subject to conditions as the parties may agree. The parties, or their duly agreed-upon agent, may utilize web services to transmit filings into the Commission's electronic filing system (SERVCON).

\* \* \* \* \*

13. Amend §531.6 by

- a. Revising paragraphs (a) and (b)(9)(ii);
- b. Redesignating paragraphs (b)(10) and (11) as (b)(11) and (12), respectively;
- c. Adding a new paragraph (b)(10);
- d. Redesignating paragraphs (d) through (g) as paragraphs (e) through (h), respectively;
- e. Adding a new paragraph (d); and
- f. Revising newly redesignated paragraphs (e)(1) and (g).

The additions and revisions to read as follows:

**§531.6 NVOCC Service Arrangements**

(a) Authorized persons shall file with BTA, in the manner set forth in appendix A of this part, a true and complete copy of:

- (1) Every NSA before any cargo moves pursuant to that NSA; and
- (2) Every amendment to a filed NSA no later than thirty (30) days after any cargo moves pursuant to that NSA amendment.

(b) \* \* \*

(9) \* \* \*



(ii) Certify that this information will be provided to the Commission upon request within ten (10) business days of such request. However, the requirements of this section do not apply to amendments to NSAs that have been filed in accordance with the requirements of this section unless the amendment adds new parties or affiliates;

(10) A certification of shipper status;

\* \* \* \* \*

(d) *Certification of shipper status.* The NSA shipper party shall sign and certify on the signature page of the NSA its shipper status (e.g., owner of the cargo, shippers' association, NVOCC, or specified other designation), and the status of every affiliate of such party or member of a shippers' association entitled to receive service under the NSA. For each NVOCC that is a shipper, an affiliate or a member of a shippers' association, its 6-digit FMC Organization Number must be entered at the time of filing into the corresponding SERVCON field.

(e) \* \* \*

(1) For service pursuant to an NSA, no NVOCC may, either alone or in conjunction with any other person, directly or indirectly, provide service in the liner trade that is not in accordance with the rates, charges, classifications, rules and practices contained in an effective NSA.

\* \* \* \* \*

(g) *Exception in case of malfunction of Commission electronic filing system.* (1) In the event that the Commission's electronic filing system is not functioning and cannot receive NSAs filings for twenty-four (24) continuous hours or more, affected parties will not be subject to the requirements of paragraph (a) of this section and §531.11 that an NSA be filed before cargo is shipped under it.

(2) However, NSAs which go into effect before they are filed due to a malfunction of the Commission's electronic filing system pursuant to paragraph (g)(1) of this section, must be filed within twenty-four (24) hours of the Commission's electronic filing system's return to service.

(3) For an NSA that is effective without filing due to a malfunction of the Commission's filing system, failure to file that NSA within twenty-four (24) hours of the Commission's electronic filing system's return to service will be considered a violation of these regulations.

14. Amend §531.8 by revising paragraphs (b)(1) and (c) to read as follows:

**§531.8 Amendment, correction, cancellation, and electronic transmission errors.**

\* \* \* \* \*

(b) \* \* \*

(1) Requests shall be filed, in duplicate, with the Commission's Office of the Secretary within one-hundred eighty (180) days of the NSAs filing with the Commission, accompanied by remittance of a \$276 service fee.

\* \* \* \* \*

(c) *Electronic transmission errors.* An authorized person who experiences a purely technical electronic transmission error or a data conversion error in transmitting an NSA or an amendment thereto is permitted to file a Corrected Transmission ("CT") of that filing within 30 days of the date and time of receipt recorded in SERVCON. This time-limited permission to correct an initial defective NSA filing is not to be used to make changes in the original NSA rates, terms or conditions that are otherwise provided for in paragraphs 531.6(b) of this section. The CT tab box in SERVCON must be checked at the time of resubmitting a previously filed NSA, and a description of the correction made must be stated at the beginning of the corrected NSA in a comment box. Failure to check the CT box and enter a description of the correction

will result in the rejection of a file with the same name, since documents with duplicate file names or NSA and amendment numbers are not accepted by SERVCON.

\* \* \* \* \*

15. Amend §531.10 by revising paragraph (b)(2) to read as follows.

**§531.10 Excepted and exempted commodities.**

\* \* \* \* \*

(b) \* \* \*

(2) *Department of Defense cargo.* Transportation of U.S. Department of Defense cargo moving in foreign commerce under terms and conditions approved by the Surface Deployment and Distribution Command and published in a universal service contract. An exact copy of the universal service contract, including any amendments thereto, shall be filed with the Commission as soon as it becomes available.

\* \* \* \* \*

16. Revise § 531.11 to read as follows.

**§ 531.11 Implementation.**

*Generally.* Performance under an original NSA may not begin before the day it is effective and filed with the Commission. Performance under an NSA amendment may not begin until the day it is effective, provided however that amendments must be filed no later than thirty (30) calendar days after effectiveness.

By the Commission.

Karen V. Gregory

Secretary

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